TETAP MAJU SDN. BHD. & ANOR.

v.

TRACTORS (M) [1982] SDN. BHD.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CIVIL APPEAL NO. K8 OF 1989]
11 NOVEMBER 1991

CONTRACT: *Construction - Previous documentation prior to signing of agreement - Subsequent act or conduct - Whether can be taken into account.*

CONTRACT: *Construction - Relevant date - Factual background known at or before date of agreement - Whether can be taken into account.*

EVIDENCE: *Common course of business - Section 114 illustration (f), Evidence Act 1950.*

WORDS AND PHRASES: *"Costs, charges and fees" - whether includes interests.*

Respondent (plaintiff) had entered into a sale agreement with the appellants (defendants) for the sale of certain equipment. The agreement was however silent as to time, mode and terms of repayment though selling price was stated therein.

In an action for recovery of the balance of purchase price, respondent sought to rely on a quotation and equipment invoice, both issued by them to the appellant prior to signing of the agreement, which set out terms of credit and due date for repayment.

Judgment was entered accordingly before the learned Magistrate. The appellant appealed to this High Court contending that the quotation and equipment invoice does not form part of the contract and therefore could not be used for construction thereof.

Held:

[1] Where the agreement itself being not clear, evidence of the factual background known to the parties at or before the date of agreement may be brought in as an aid for construction.

[2] However, what the parties said or did after the agreement was made cannot be legitimately used for purpose of construction thereof.

[3] The quotation and equipment invoice being issued within the same transaction are not something extrinsic to the agreement, instead they marked as the starting point of the transaction.

[4] The appellants being businessmen knew or ought to have known of the practice regarding interests and dates of repayment.

[Appeal dismissed.]

Cases referred to:

Re-Lin Securities (Pte), Peter Chi Man Kwong & 2 Ors. v. Asia Commercial Bank & 20 Ors. [1988] 2 MLJ 137 ***(foll)***
Weardale Co. v. Hodson [1894] 1 QB 598 ***(foll)***
James Miller & Partners Ltd. v. Whitworth Street Estate [1970] AC 583 ***(foll)***
Schuler A.G. v. Wickman Machine Tool Sales Ltd. [1974] AC 235 ***(foll)***
Prenn v. Simonds [1971] 1 WLR 1381 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 114 illustration (f)

Other source referred to:
Stroud's Judicial Dictionary, 4th Edn.

For the appellants - Patricia Hiew; M/s. Chau & Thien
For the respondents - Sucy Ng Lee Fong; M/s. Wong Yapp Chung & Co.

JUDGMENT

Syed Ahmad Idid JC:

The appeal dated 9 September 1988 was by both the 1st and 2nd defendants against the whole of the decision of the Magistrate's Court, Kota Kinabalu , given on 5 September 1988. The learned Magistrate had ordered that the 1st defendant's defence and counterclaim and 2nd defendant's defence be struck out under the Subordinate Courts Rules. It was adjudged that the two defendants pay the plaintiffs (or respondents here) RM21,225 with interest and costs.

The facts of the matter were that:

(i) On 27 January 1984, the respondents issued a quotation in response to appellants' "invitation to quote" and in that the terms of payment was stated as "60 days credit" (TTK2);
(ii) An equipment invoice dated 25 April 1984 (TTK3) stated "customer" as the 1st appellant and "terms" 60 days credit. Additionally it also stated "due date for repayment" as 16 June 1984.
(iii) A sale agreement (the agreement or TTK1) was signed between 1st appellant and the respondents on 11 May 1984;
(iv) A schedule (CS1) to the agreement issued also on 11 May 1984 stated the selling price as RM155,000. The columns for "repayment" and "instalments" were left blank. This schedule was to have been attached to the sale agreement (TTK1);

Contention

The appellants urged upon the Court that the agreement dated 11 May 1984 "was the only agreement made by the plaintiffs and 1st defendant" (Paragraph 5 of defence of 1st defendant) whereas the respondents claimed that the two other documents TTK2 and TTK3 were part of the transaction and it was their understanding that these formed the contract.

Miss Sucy Ng Lee Fong, for the respondents, submitted that both TTK2 and TTK3 were "additional and not extrinsic" evidence and that they were part and parcel of one transaction, that is sale and purchase of the equipment in question. She added that the goods were supplied on" 60 days credit".

I shall not deal with the appellants' other contention that the goods were supplied or sold "on project sales basis" in the absence of any evidence from the agreement. They cannot blow hot and cold in that in one breath they asked that the respondents must shut out the "extrinsic" evidence (of TTK2 and TTK3) and yet simultaneously they claimed that there was an oral representation in their favour ("on or about the 11 May 1984 ... the payment of the price can be made for the set as and when the 1st defendant receives its progress payments from JKR ...").

The agreement was drawn up by the respondents and was printed in standard form. Respondents therefore had the opportunity to add or modify it to suit their requirements or to plug loopholes or to include previous correspondence or term it as non-exclusive. It would

have dispelled all doubts if TTK1 had some words added to it, for example, "whereas the company had agreed to sell and the customer to buy the equipment more particularly set out in the equipment invoice on terms of 60 days credit ..."

Nowhere in the agreement was any reference made to TTK2 and TTK3 or the nature of any previous documentation as forming part of that agreement.

The Singapore case of *Re-Lin Securities (Pte.), Peter Chi Man Kwong & 2 Ors. v. Asia Commercial Bank & 20 Ors.* [1988] 2 MLJ 137 was canvassed where at (3) it held that "one should not determine the effect of the LOH (Letters of hypothecation) wholly within the four corners of the document. It must be viewed in the context of the surrounding circumstances of the transaction". If one holds this view, and this was what the learned Magistrate had done, then TTK2 and TTK3 can be admitted and be read with the agreement.

This action was evenly contested and argued. Both the lady counsels had worked hard and their written submissions here left me with great difficulty of tilting easily to one side and not the other.

TTK1 was not helpful in its own cause. Its clause 1 stated the purchase price at RM155,000 and payment was to be made in accordance with the schedule (CS1. See p. 73 of the appeal record). There was no explanation in the schedule as to the method, mode or date of payment. The words "60 days credit" in TTK2 did not refer to any date or event. The conditions imposed (at p. 70 of the appeal record) was that the "customer must strictly adhere to the terms of payment". TTK3 was dated 25 April 1984 (or two weeks before TTK1).

The sale agreement at Clause 4 stated that if the customer (that is appellants here) did not settle the purchase price "within the time stipulated, the company (or respondents) was at liberty to sell or dispose of the equipment. " By Clause 5, if the time had come and the equipment was disposed of, the company was only "entitled to recover from the proceeds of the disposal the purchase price together with all costs, charges and expenses incurred ... in consequence of the default." Interest was not mentioned. However, it is my opinion that the phrase "costs, charges and expenses", popularly used in legal documents, has come to include fees, rates, such as interest, taxes and other outgoings. See *Stroud's Judicial Dictionary* (4th Edn). Interest "on the said sum", which sum is payable by instalments, means that the interest is payable on such of the sum as from time to time shall be unpaid. *Weardale Co. v. Hodson* [1984] 1 QB 598.

Clause 6 of the agreement talked of "default in payment of instalment" and the "due date". These terms were inTTK-2 and TTK-3. The agreement itself being not clear, TTK2 and TTK3 were brought in as an aid. This was evidence of the factual background known to the parties at or before the date of the agreement.

Legal Arguments

Having examined the depth of this case, I must confess that I am inclined towards the ruling in *James Miller & Partners Ltd. v. Whitworth Street Estate* [1970] AC 583 where at p. 603, Lord Reid said:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

I have stressed the word "after" as it is important in the context of my decision today. The TTK2 and TTK3 were issued before the agreement (TTK1). The ruling in *Whitworth Street Estate* (*supra*) was reaffirmed subsequently in another House of Lord's decision in *Schuler A.G. v. Wickman Machine Tool Sales Ltd.* [1974] AC 235. The decision makes sense as to hold otherwise would open up a pandora box of excuses by another or the others in cases where compliance proves difficult or more expensive than earlier anticipated, that is from the time the agreement was negotiated.

But not all agreements are air-tight or watertight or so concrete that all who read them can fully appreciate what each party is to do or has undertaken to do. In that respect, I am of the opinion that Lord Wilberforce in *Prenn v. Simonds* [1971] 1 WLR 1381 must be followed when he said:

> In my opinion, evidence of negotiations or of the parties's intentions ... ought not to be received and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

I can take into consideration the matrix of facts, that is the conduct of the parties at the time the contract was entered into (or in our case the time when the sale and purchase agreement was signed). It must be obvious to the parties that both the respondents and the appellants must have known (and taken cognisance) of the "60 days payment terms" and that should there be a delay in the payment, then the question of interest would arise. Clause 6 of the agreement (which appellants denied was applicable) mentioned interest.

The Evidence Act at s. 114, illustration (f), allows me to presume that the common course of business had been followed in particular cases, that is that there was interest payable upon the sales of the equipment etc.

Conclusion

From the facts, it became clear that the appellants were fully aware of the terms in TTK2 and TTK3 and, being businessmen, they knew or ought to have known of the practice regarding interest and dates of payments. I find that the documents were issued within the same transaction or sale of the equipment and as such TTK2 and TTK3 were not extrinsic to the agreement. I find that their existence provided clarity to the "genesis" of the transaction. I therefore affirm the learned Magistrate's decision and dismiss the appeal with costs.

Also found at [1992] 2 CLJ 889